

**United Parcel Service, Inc. and Robert W. Bowlds
and David E. Perkins. Cases 25-CA-11313 and
25-CA-11313-2**

March 21, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On October 30, 1980, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the Administrative Law Judge's Decision, and Respondent filed a supplemental brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.⁴

¹ Respondent's unopposed motion to file a supplemental brief is granted.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ In affirming the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by promulgating, maintaining, and enforcing an unlawfully broad no-distribution rule, we refer solely to the implied restrictions against distribution on nonworking time which Supervisor Mouser communicated to employee Perkins in a February or March 1979 conversation. We find no need to decide whether Respondent's written no-solicitation, no-distribution rules also violated Sec. 8(a)(1). See *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

⁴ The Administrative Law Judge recommended that Respondent cease and desist from "in any like or related manner" interfering with the employees' Sec. 7 rights. We find that the issuance of a broad order is warranted inasmuch as Respondent has previously been found to have violated the Act in certain respects similar to the violations found herein. See *United Parcel Service, Inc.*, 252 NLRB 1015 (1980). Thus, Respondent has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for the employees' fundamental Sec. 7 rights.

We note that during this proceeding, and during the grievance and arbitration proceedings involving employee Bowlds' suspension on August 28, 1979, and his subsequent discharge, Respondent defended its conduct by relying in part on a final warning letter it issued to Bowlds on October 3, 1978. In *United Parcel Service, Inc.*, *supra*, the Board found that the discipline which resulted in this final warning letter was unlawful. It follows that this letter was nullified by the Board's decision. Respondent's use of the letter, in the instant case, as evidence that its discipline of Bowlds was legitimate is, to the contrary, further proof of Respondent's unlawful discriminatory motivation.

Apparently through inadvertence the Administrative Law Judge failed to require Respondent to expunge from its records any references to the

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, United Parcel Service, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the disciplinary suspension of Bowlds and Perkins issued on August 28, 1979, and to their subsequent discharges, and notify them in writing that this has been done, and that evidence of these unlawful actions will not be used as a basis for future discipline against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

August 28, 1979, suspensions and subsequent discharges of Bowlds and Perkins. We shall modify the recommended Order accordingly.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT promulgate, maintain, or enforce a no-distribution rule prohibiting distri-

bution of union literature or materials on company property at any time.

WE WILL NOT discriminate against our employees because they gave testimony in a Board proceeding.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees in violation of the rights guaranteed them under the Act.

WE WILL NOT discourage membership in Teamsters Local 710 or Teamsters Local 89, or any other labor organization, by discriminating against our employees in regard to their hire and tenure of employment or any terms or conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their exercise of the rights guaranteed them under the Act.

WE WILL offer to Robert Bowlds and David Perkins reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or benefits, plus interest.

WE WILL expunge from our files any references to the disciplinary suspensions of Bowlds and Perkins issued on August 28, 1979, and to their subsequent discharges, and notify them in writing that this has been done, and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

UNITED PARCEL SERVICE, INC.

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Law Judge: Based on charges and amended charges filed on certain dates in September and October 1979, by Robert Bowlds and David Perkins, a consolidated complaint was issued on October 24, 1979, against United Parcel Service, Inc., herein Respondent or the Company, alleging violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and Respondent filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Ohio corporation with an office and place of business located at Owensboro, Kentucky, where it is engaged in the interstate transportation and distribution of parcels and a parcel delivery service. During the year preceding the hearing herein, Respondent performed services valued in excess of \$50,000 in States other than the Commonwealth of Kentucky. During the same period it received gross revenues in excess of \$500,000, as a link in the interstate transportation of goods. It is conceded, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local 710, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters Local 89, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

It is alleged that in March 1979 Respondent promulgated, and since said date has maintained, the following rule:

No distribution of UPSurge written material on the Respondent's property at any time.

It is also alleged that Respondent promulgated the rule described above in order to discourage its employees from joining, supporting, or assisting UPSurge, and that in March 1979 Respondent, by its officer and agent Tom Mouser, maintained and enforced the rule by prohibiting its employees from passing out UPSurge materials at any time while they were on company property.

It is further alleged that on August 31, 1979, Respondent discharged Robert Bowlds and David Perkins, and that Respondent did so because: (1) said employees filed charges with the Board and gave testimony under the Act; (2) said employees joined and assisted Teamsters Local 710 and Teamsters Local 89; (3) said employees joined and assisted UPSurge; (4) said employees joined and assisted PROD; (5) said employees engaged in other union activity and concerted activities for the purpose of collective bargaining and mutual aid and protection, including participation in filing a civil suit against Respondent, and because Respondent believed they had engaged in such activities or would do so.

Since 1965, Bob Bowlds has been employed by Respondent at its Owensboro, Kentucky, facility as a feeder driver. During 1979 his scheduled run was from Owensboro to Nashville and then a return trip. During the periods material hereto, David Perkins started his feeder run at Campbellsville, Kentucky, his home base, drove to Nashville, and on his way back made a stop at Bowling Green, Kentucky, and then returned to Campbellsville. Perkins had driven this run since 1977. The Company

maintains that both drivers were terminated in late August 1979 for overextending their rest breaks and falsifying their timecards.

It appears that feeder drivers, such as Bowlds and Perkins, report each day to their home location, drive a trailer load of packages to the same destination or terminal for dropoffs, and then return to their origin that same workday with a new load of packages. A feeder driver is assigned a specific start time each day to begin his scheduled run. After punching the timeclock, a feeder driver must "pre-trip" his truck before departure from the terminal. This consists of checking oil and water and visually inspecting the safety equipment on the tractor and trailer. After completion of the pre-trip inspection the feeder driver then updates his ICC logbook and timecard. Each driver is assigned a specific time when he is scheduled to physically depart his home facility and begin driving to his destination.

When en route to his destination, the feeder driver is allowed one 15-minute break on the down leg, provided the distance to his destination is 100 miles or greater. In addition to the 15-minute break, the driver is also allowed up to 5 minutes' additional time contiguous with the rest break for usual safety inspection of his rig and to update his timecard and logbook, but the time and place of the 15-minute rest break is left to the discretion of the driver. However, each feeder driver is scheduled to arrive at his destination at a precise time. The Company maintains that punctuality is paramount due to the fact that each package load is destined for different States, and the packages must be re-stored at the destination and then loaded on to other feeders or trucks which are scheduled to leave at precise times in order to make connections at their destinations.

It also appears that once at his destination (Nashville) the feeder driver then takes his 30-minute lunch break. Other duties of the feeder driver at his destination terminal include fueling of tractors, washing trailers, spotting trailers in the hub yard, and loading or unloading packages, and each driver, when his return trailer is hooked up, must complete another pre-trip inspection prior to departure and update his logbook. Departure for return to his home terminal is also scheduled on an assigned time and, on his return, if it exceeds 100 miles, the feeder driver is again allowed another 15-minute rest break, plus the 5-minute safety check including the update of his logbook and timecard. The driver is also assigned a specific time to return to his home terminal, and upon arrival makes a visual "post-trip" inspection of his equipment, completes his logbook and timecard, and punches out. The timecard, which is filled out completely by the driver, must accurately reflect the amount of time the feeder driver spent on the road and on breaks and, in conformity with Government regulations and company policy, each feeder driver must also note any defects or problems with his equipment on a "Car Condition Report."

A. As to Bowlds

For background purposes, it is noted that Bowlds was terminated twice in 1978. He was first discharged by Respondent on April 24, 1978. Thereafter, on May 24, 1978,

Bowlds received a final warning. This warning, also pursuant to the grievance procedure, was rescinded on June 14, 1978. Bowlds was again terminated on August 4, 1978, but again, pursuant to the proceedings and a decision at the final arbitration step of the grievance procedure, Bowlds was reinstated on or about October 3, 1978. However, in the absence of an award for backpay by the arbitration panel, Bowlds was not reimbursed for the aforesaid period that he was off work.¹ There was also an earlier case before the Board (*United Parcel Service, Inc.*, Case 25-CA-10318), involving the August 4, 1978, termination of Bowlds alleging that Respondent unlawfully discharged Bowlds for his union activities—for his efforts on behalf of PROD and UPSurge, and for his participation in the filing of a lawsuit in the United States District Court for the Western District of Kentucky to improve working conditions at Respondent. This earlier Board case was heard on April 5, May 30, and September 12, 1979, and Administrative Judge John P. von Rohr issued his Decision on January 10, 1980. In this earlier case the issue was similar to the instant one: did Respondent fire Bowlds for overstaying his 15-minute break? (Perkins was not involved in this case.) Administrative Law Judge von Rohr found and concluded that Bowlds was unlawfully issued a final warning earlier and then later unlawfully discharged for his union and protected concerted activities. Administrative Law Judge von Rohr noted, among other circumstances, that Bowlds was discharged unlawfully for his activities on behalf of PROD and UPSurge, as well as Bowlds' participation in the class action suit against Respondent in the U.S. district court, and the Board recently affirmed this Decision. See *United Parcel Service, Inc.*, 252 NLRB 1015 (1980).

It is noted that UPSurge is an organization of Respondent's employees which is generally critical of the Teamsters Union, as well as Respondent, in matters pertaining to labor relations and in matters pertaining to the employees' wages, hours, and working conditions. This organization periodically publishes a newspaper and other pamphlets to express its views. PROD is a related organization of Respondent's employees, similarly involved. I need not dwell further on the subject, since the Board has held, and I find, that employee activities on behalf of these organizations constitute protected concerted activity.² As relevant background to the instant case, I further take official notice that the Board, in the aforesaid cases, has found that Respondent has engaged in various unfair labor practices in connection with its opposition to employee activities on behalf of the organizations in question.

UPSurge activities among Respondent's employees began in 1975. From then on, and at all times material hereto, Bowlds was responsible for distributing UP-

¹ It appears, that at all times material hereto Respondent's employees were represented by Local No. 89 of the Teamsters Union, and that all grievance matters, meetings, and awards, as detailed herein, were held under the grievance procedure of the collective-bargaining agreement between the parties.

² *United Parcel Service, Inc.*, 230 NLRB 1147 (1977); *United Parcel Service, Inc.*, 234 NLRB 223 (1978); *United Parcel Service, Inc.*, 234 NLRB 483 (1978); enforcement denied 104 LRRM 2615 (6th Cir. 1979).

Surge's newsletter and literature among the 45-50 employees at the Owensboro terminal in late 1976 or early 1977. Bowlds engaged in similar activities on behalf of PROD at that facility and distributed the bimonthly PROD newsletter to the Owensboro employees. Bowlds specifically testified that when he openly distributed UP-Surge at the Owensboro Terminal, in 1977, 1978, and 1979, Supervisor Tom Campbell was present on several occasions while he did so. Bowlds further testified that when he openly distributed PROD at the Owensboro terminal, he did so in front of Supervisors Tom Campbell, Herschel Cash, and Mike Worth.

As to the 1977 class action suit against Respondent in the U.S. district court, Bowlds stated that he assisted in bringing this suit on behalf of drivers in Kentucky relative to a state statute prescribing or pertaining to certain breaktimes, and that he also solicited money for this suit and later hand-passed and mailed out petitions in conjunction therewith. He stated that the case is now (April 1980) being reviewed by the Sixth Circuit Court of Appeals.

Respondent produced testimony through their Division Manager Bob Jones, who has overall responsibility for all feeder operations in Kentucky, to the effect that from the time Bowlds was reinstated on October 3, 1978, as aforesaid, until August 27, 1979, he had received occasional complaints about Bowlds returning late to the Owensboro Center—that both Owensboro Center Manager Tom Campbell and Western Division Manager Ben Cissell had reported that Bowlds was still returning behind schedule. Jones then relayed these complaints to Darwin Turpin, the feeder manager, and later on to Turpin's successor, George Knoblock.

Respondent also has a policy of running "service checks" on its drivers from time to time, and on March 14, 1979, Feeder Supervisor Herschel Cash went with Bowlds and performed a service check of Bowlds from the Owensboro Center to his destination at Nashville and back. It appears that the general purpose of the service check is for a supervisory inspection and evaluation of driver performance, undertaken every few months for all feeder drivers. On this occasion Bowlds arrived at Nashville about 4 minutes late. He then departed Nashville on time and arrived at the Owensboro center about 8 minutes late. At the conclusion of the run Supervisor Cash told Bowlds how he could correct this delay. Bowlds had taken the proper rest breaks on this run. On May 9, 1979, Supervisor Cash again made a service check on Bowlds, and again Bowlds complied with the rest break periods, but was 6 or 7 minutes late in arriving in both directions.³

Supervisor Cash receives weekly operation reports which reflect the actual driving time, turnaround time, and finish time of all feeder drivers under his supervision, and Cash testified that between August 1 and

August 27, 1979, Bowlds was consistently returning to the Owensboro center 15 minutes or more late. He stated that Bowlds was scheduled to arrive at Owensboro from Nashville at 6 a.m., yet he was returning at 6:15 a.m. or later. Moreover, on August 22, 1979, he talked to Bowlds in Nashville, and again instructed him to have his trailer coupled, complete his pre-trip inspection, and be ready to leave the Nashville hub at 2:40 a.m., and to be "out the gate at 2:45 a.m." Bowlds replied, "Okay." Cash testified that a feeder driver does have control over the time he leaves the Nashville terminal, but Bowlds (and Perkins) testified that there can be several factors which can and do cause considerable delays from time to time.

Turning now to the specific events and circumstances involved in the instant case pertaining to Bowlds: On the night of August 27-28, 1979, Bowlds came to work early, at or about 8:10 p.m. and with an assigned starting time to Nashville of 8:40 p.m. Bowlds was due to leave the Owensboro terminal at 8:58 p.m., but testified he had come in prior to his starting time in order to get away early since he was sleepy, and also he had been asked by his fellow-driver Don McMahon to leave early so that McMahon could check out his CB radio en route. As 8:45 p.m. Bowlds started his trip and proceeded down the road on Kentucky's Green River Parkway, but testified that near the end of the parkway he was having trouble staying awake, so around 10:15 p.m. he pulled over and stopped for less than 10 minutes in order to rest and relieve himself and to walk around and become more alert.⁴

Bowlds testified that his next stop was at the Key truck stop near Franklin, Kentucky, at or about 11 p.m., and at this time he took his allowed 15-minute break—his timecard shows 11:02 to 11:17 p.m. It appears that on this occasion Bowlds had a cup of coffee with the night manager of the truckstop. Night Manager Wilson "Wimpy" Randolph testified that Bowlds came into the truckstop cafe almost nightly, and would take from 10 to 15 minutes to have coffee, and the only time that Bowlds took longer than 15 minutes was when his tractor broke down. (Respondent accused Bowlds of taking 22 minutes at this stop.) Bowlds then went on his way to Nashville and stated that he arrived at Nashville at or about 12:17 a.m.—now August 28—and that he was only 1 minute late.

Bowlds testified that he left Nashville on his return leg at or about 2:55 a.m., and arrived at Owensboro, Kentucky, at 6:16 a.m. on August 28, 1979, and en route stopped for his 15-minute break at the Amoco service station in Franklin, Kentucky, at or about 4 a.m. along with over-the-road driver David Perkins. Tracy Sampson, night manager of the Amoco station, also had coffee with Bowlds and Perkins. Tracy Sampson stated that both Bowlds and Perkins were there that night at the Amoco station for only 15 minutes or so, and that Bowlds looked at his watch from time to time. According to Sampson, Bowlds and Perkins came in together

³ It appears that Respondent also has a policy wherein feeder drivers are followed and monitored by supervisors from time to time in order to ascertain whether excessive breaks are taken, and that there have been instances in the past where such violations have been detected and the driver involved was then terminated or suspended where such a violation was proven, but it appears that in most instances in the past, the alleged offense was not proven.

⁴ It appears that, when drivers normally stopped for a few minutes to relieve themselves, such stops were not considered a "break," and therefore were not logged or noted.

and left together; he testified that he has never known Bowlds or Perkins to stay over 10 or 15 minutes, but could not remember the exact time on the morning here in question. (Respondent has accused Bowlds and Perkins of taking 32 minutes here.) Bowlds maintains he was back in his truck in 15 minutes and that he left the Amoco station at 4:15 a.m.

Bowlds testified that he then proceeded toward Owensboro, but "somewhere up the road" he began to get a little drowsy so he pulled off the road and relieved himself, and that this stop would not have been more than 5 minutes. According to Bowlds, he reached Owensboro 3 hours and 20 minutes after he left Nashville, the time allotted to him for this run. Bowlds explained that he was supposed to leave Nashville at 2:45 a.m., but on occasions there would be trucks ahead of him and so the exact departure time would vary a few minutes. On the date in question, according to Bowlds, on his return leg he arrived at Owensboro at 6:16 a.m. after leaving Nashville at 2:55 a.m.—3 hours and 21 minutes later, or 1 minute late. (See Resp. Exh. 6, Bowlds' timecard for the periods here in question.)

On August 28, 1979, Bowlds was suspended by Supervisor Ben Cissell for allegedly overextending his breaks on August 27-28, 1979, and for falsifying his timecard. At the meeting with management on August 28, Bowlds asked when all this had taken place and who saw him overextend his breaktime. Union Steward Jim Weafer attended this meeting with Bowlds, and Bowlds testified that he also asked to see his personnel file in order to get information on the accusations, but was merely informed that it would be made available at a later date.

On August 30, 1979, Bowlds returned to Respondent's office to see his personnel file, but management did not have it, and Bowlds then filed a grievance contesting his August 28 suspension.

On August 31, 1979, Bowlds was called in and met with Union Steward Jim Weafer and Supervisors Tom Campbell and Ben Cissell. Cissell told Bowlds that he was discharged for falsifying his timecard and overextending a break. Supervisor Cissell also asked Bowlds why he stopped along the Green River Parkway for 24 minutes on the southbound trip on the night of August 27. Bowlds replied he took less than 10 minutes since he was sleepy and had to relieve himself. Bowlds testified that on this occasion Cissell also accused him of stopping for 5 minutes at the Amoco truckstop at Franklin, Kentucky, on his down leg, but he denied that he had stopped there. Then Cissell asked him why he took 22 minutes at the Key truckstop. Bowlds replied that he took *only* 15 minutes on his allotted break. Then Cissell, according to Bowlds, asked him why he took a 32-minute break at the Amoco truckstop on his northbound or return leg. Bowlds replied that he *only* took 15 minutes as his break at Amoco. Bowlds stated that he then inquired who in management saw him overextending his breaks, and Cissell answered Herschel Cash, and that he then again asked to see his personnel file, but Cissell replied that it was still in Louisville. Bowlds testified that during this meeting the facts that he (Bowlds) was the union steward at Owensboro Terminal and had filed many grievances, that he had been involved in the distri-

bution of PROD and UPSurge literature at Respondent's premises in sight of management in the past, that he had been a witness in his own Board case on May 30, 1979 (Case 25-CA-10318) dealing with earlier events in that case, and that his involvement in a lawsuit against Respondent in the U. S. district court to get better working conditions were not brought up.

On September 4, 1979, Respondent mailed Bowlds a written copy of his discharge, and on September 4, 1979, Bowlds filed his grievance for his discharge of August 31.

On September 11, 1979, a local joint meeting concerning the grievance filed by Bowlds was held at Owensboro with Supervisors Ben Cissell, Tom Campbell, and Bob Jones representing Respondent, and Thomas Trenaman of Local 89, Union Steward Jim Weafer, and Robert Bowlds, all representing the latter. According to Bowlds, Bob Jones read the charge against him concerning overextending his breaks and falsifying his timecard for August 27-28, and also the earlier October 3, 1978, letter to Bowlds from Respondent (Resp. Exh. 5) which provided an immediate discharge of Bowlds for another overextension of his breaktime. Union Agent Thomas Trenaman read the second Bowlds discharge grievance and it was agreed that the suspension grievance and the discharge grievance of Bowlds be treated as one. It appears that Trenaman also questioned management as to the times of the alleged overextension of Bowlds' break-times, and introduced the written notarized statement of Tracy Sampson, night manager of the Amoco truckstop, dealing with the early morning of August 28, and the notarized statement of Don McMahon concerning the fact that Bowlds had come to work early the night of August 27, and had departed from the Owensboro terminal early, and that this was not an uncommon practice for drivers to do. Respondent did not produce the clock times of Bowlds' alleged overextension of his breaks of August 27-28, and also mentioned that Respondent's observers of Bowlds' alleged overextensions were Supervisor Herschel Cash along with George Knoblock and Larry Harris. At this September 11 joint grievance meeting, Bowlds also told his story concerning the events and circumstances on the night of August 27 and the morning of August 28, as aforesaid, but testified that his involvement with PROD and UPSurge on Respondent's premises in management's presence, his participating in the class action lawsuit against Respondent in the U.S. district court to secure better working conditions for Respondent's Kentucky employees, his being the Union's job steward at the Owensboro terminal of Respondent, his filing of many grievances in recent years, and his testifying in his own behalf in the earlier Board case were not discussed (except partially read as a grievance) in his joint meeting. The parties were *deadlocked* at this September 11 joint grievance meeting and the case was referred to the next step in the grievance procedure—the state panel.

At the Kentucky state level joint grievance meeting concerning Bowlds' grievance, held at Louisville on October 9, 1979, management representative Bob Jones read the charges against Bowlds for his alleged overextension

of his breaks and falsifying his timecard on August 27 and 28, 1979. Jones also read Respondent's October 3, 1978, "final warning" letter to Bowlds and discussed the times on August 27-28 that Bowlds allegedly overextended his breaks; management then called Respondent Supervisors Herschel Cash, Larry Harris, and George Knoblock to testify against Bowlds concerning their observations on the night and morning here in question. Bowlds also repeated his story, but again stated that the class action in the U.S. District Court of Louisville, his PROD and UPSurge handbill distribution on Respondent's premises in management's presence, his job stewardship and his filing of grievances against Respondent, his filing of his charge in his earlier case and his giving testimony in support of it was not discussed except that Trenaman, in stating Bowlds' grievance, did make some reference thereto by reading the grievance. This October 8, 1979, state level panel was deadlocked.

On October 30, 1979, the joint area conference meeting concerning Bowlds' grievance was held in the Sheraton Inn at O'Hare Airport in Chicago. Jones again read the charge against Bowlds, furnished statements from managements' three witnesses—Herschel Cash, Larry Harris, and George Knoblock—read the final warning letter of October 3, 1978, and read the times of the alleged overextension of the breaks. Bowlds then spoke concerning these events and circumstances in the same way as he had done before, but again the above-mentioned union and concerted activities of Bowlds were not discussed. This JAC joint meeting was also deadlocked.

On November 20, 1979, "a deadlocked JAC" joint meeting took place in Chicago, and a summary of the two parties' positions was presented before the judging panel. Bowlds spoke briefly and either transcripts of the JAC meeting or affidavits were introduced, but again his union and concerted activities were not specifically discussed. Bowlds lost at this level since the panel denied his grievances, and sustained Respondent's discharge of Bowlds. It appears that, at each step of the grievance procedure, Trenaman read Bowlds' grievance in its entirety into the record, and at each level Bowlds was afforded the opportunity to submit additional evidence in support of his grievance.

C. As to Perkins

For the periods involved herein, Perkins started his feeder run at Campbellsville (his home base), drove to Nashville, and on his return trip made a stop at Bowling Green, and then back to Campbellsville.⁵ He stated his employment with Respondent in 1971.

Under normal circumstances Perkins came to work at 9:55 p.m. (punch-in time), and was due to go out of the Campbellsville terminal at 10:10 p.m. (e.s.t.). Perkins testified that the Nashville supervisor told him that he was to be at Nashville at 1:40 a.m., but that his Campbellsville supervisor told him he was to be at Nashville at 1:34 a.m. Perkins was also told to leave Nashville at 3:45 a.m. but no later than 4 a.m. and was scheduled to return at 8:05 a.m. to Campbellsville, but in early 1979 this time

was changed to 7:55 a.m. However, there was no mileage change—only 10 minutes taken off the driving time, and Perkins stated that, at the time of his change, he explained to the supervisor that he could not make the run in 10 minutes less, but the supervisor told Perkins that this 10-minute cut was based on a national average, and then told him to do the best he could. Thereafter, Perkins would sometimes run late by 10 minutes in getting into his home base, and in the spring of 1979 his supervisor at Campbellsville, Tom Mouser, began telling Perkins that he was getting to the home terminal late. Perkins testified that he sometimes left Nashville late and other times got tied up at Bowling Green to sort packages. Perkins stated that for a while he also noticed the Campbellsville terminal's clock was 10 minutes fast and that he reported this to management on a number of occasions, but it was not corrected.

On the night of August 27, 1979, Perkins left Campbellsville at 10:25 p.m. (15 minutes late) and arrived at Nashville at 1:55 a.m. (EST). According to Perkins, he left Nashville at 3:55 a.m., arriving back at Campbellsville at 8:05 a.m., with a 15-minute break at 12:15 to 12:30 a.m. on the down leg (southbound), and a 15-minute break with Robert Bowlds at 5:05 to 5:20 a.m. (e.s.t.) at Franklin, Kentucky—at the Amoco truckstop on his return.⁶ Perkins notes that he actually stopped at the Amoco truckstop at 4:58 a.m. (e.s.t.) and it was 5 a.m. (EST) by the time he and Bowlds (who had been driving caravan with Perkins from Nashville) went into the Amoco truckstop lot. Perkins then updated his logbook and next went into the Amoco cafe and joined Bowlds and Amoco Manager Tracy Sampson in a booth. Perkins stated at this time that they could not sit there long because he and Bowlds had only 15 minutes to stay there, and he checked his watch as did Bowlds. Both drivers then left, and Perkins continued on to Campbellsville, but before reaching his destination had to stop 3 or 4 minutes to let his hot engine cool off.

That evening (August 28) Perkins talked with management people at Campbellsville. Bob Jones, Neil Mulvaney, and George Knoblock, all supervisors of Respondent, spoke with Perkins, in the presence of Steward Bobby McMahon. Jones told Perkins that he had been observed overextending his break and falsifying his timecard, and that he was suspended until further investigation. Perkins then asked, where and when? Jones replied that their lawyers had this information.

Two days later, on August 30, Perkins was then called in by Supervisor George Knoblock, and again Jones, Knoblock, and Mulvaney were present, and Perkins then called in McMahon, the union steward. Supervisor Jones accused Perkins of taking 32 minutes at the Amoco truckstop on the morning of August 28, saying that he was terminated. Perkins testified that both he and McMahon asked for the clock times of this break, but Jones told them that their lawyers had it, and that Union Agent Tom Trenaman would later get this information.

Perkins stated that he had testified in the earlier case involving Bowlds, and that on occasion he had also dis-

⁵ Perkins operated on eastern standard time—1 hour ahead of Owensboro and Nashville.

⁶ See G.C. Exh. 11, the timecard of Perkins for the period herein in dispute.

tributed UPSurge handbills at the Campbellsville terminal in the presence of Terminal Manager Tom Mouser (in February or March 1979), and that Mouser had told him that he preferred that he (Perkins) not do it. Perkins said that he also distributed PROD at the terminal at Campbellsville on one occasion. Moreover, Perkins testified that he also was active in the U.S. district court class action lawsuit with Bowlds by collecting money from employees beginning about October 11, 1976, and thereafter, at the Campbellsville terminal, and that he further collected signatures for this class action from Campbellsville drivers and then turned in the signed petitions to Bowlds. Additionally, Perkins filed grievances including one on February 14, 1979, against Respondent, and it went through the grievance procedure under the Teamsters contract with Respondent but Perkins lost this grievance.⁷ Perkins testified that on February 28, 1979, he told Supervisor Mouser that he needed some additional trousers or pants for his uniform, but Mouser answered, "Perkins, we're trying to figure out a way to fire your ass anyway. We won't have to get you any." Bobby Pierce and Eddy O'Banion were in the immediate area of Mouser at the time. It is noted that both Pierce and O'Banion were in corroboration of Perkins as to this incident.

Campbellsville Center Manager Tom Mouser has been stationed there since February 1978, but Mouser was absent from the center from July through October 1979, on special assignment, so he had nothing directly to do with Perkins' suspension and discharge in late August 1979. However, this record shows that all company drivers are furnished uniforms and are required to wear them whenever they are on duty—and such requirements are contained in the bargaining contract. Mouser testified that sometime in early 1978, it was reported to him that Perkins had driven that night wearing blue jeans and not his uniform trousers, and as a result he told Perkins that if he ever needed uniform trousers to let him know, and that later in 1978, he took Perkins' uniform to the cleaners on several occasions—that in February 1979, Perkins reported, after he returned from his run, that he needed a clean pair of pants for that night. Mouser said that he would get them for him, but Perkins replied, "If you don't have them ready, I'll wear my blue jeans out of the center." Mouser testified that he then told Perkins that he would have a pair of pants there for him and he was not to leave the center wearing blue jeans, and added that if Perkins did so he would be terminated. At the time this conversation occurred, Mouser admittedly was working the package sort near Bob Pierce and Ed O'Banion.

⁷ Counsel for Respondent argues that the allegations that Bowlds' and Perkins' suspensions and discharges resulted from discrimination based on supposed activities for PROD, UPSurge, the rest break lawsuit, the grievance filings, and their participation and testimony in the earlier Board case—are all transparent. Respondent points to Jim Weafer, a union steward for many years, and the fact that Weafer has filed a number of grievances and has testified in different matters and yet was never disciplined, and Weafer was also one of the 13 named plaintiffs in the rest break class lawsuit. It is also pointed out that Supervisor Mouser denied seeing Perkins distribute UPSurge, and that Bowlds could not recall any specific day or month he distributed UPSurge or PROD at the terminal in Owensboro.

After Perkins was discharged, he filed a grievance on September 4, 1979, and the grievance was processed. On September 11, 1979, a joint local hearing was held at Owensboro and Perkins' grievance was heard at the local level on the same day that Perkins testified at the Board's hearing in the prior Board case (Case 25-CA-10318). At this grievance hearing, Supervisor Bob Jones accused Perkins of taking a 32-minute break on the morning of August 28 at the Amoco truckstop, and falsely putting down the wrong time on his timecard. Then Union Agent Tom Trenaman read Perkins' grievance, and introduced the affidavit of Amoco Manager Tracy Sampson⁸ (mentioned above in Bowlds' case), stating that Bowlds and Perkins were there only about 15 minutes. Further, Trenaman presented Jones with the affidavit from Pierce⁹ stating that Mouser had informed Perkins in February that Mouser was going to fire Perkins anyway, as aforesaid. At this meeting no one discussed Perkins' involvement with PROD, with UPSurge, his involvement with the class action lawsuit against Respondent, the filing of his February 1979 grievance, or Perkins' former testimony in the earlier Bowlds' case (Case 25-CA-10318).

On October 9, 1979, Perkins attended a state level joint grievance meeting at Louisville, and again Supervisor Bob Jones presented Respondent's case, reading the charge that Perkins took a 32-minute break on August 28, from 3:53 to 4:25—Union Agent Tom Trenaman presented Perkins' case, and offered the above-mentioned affidavits from Sampson and Pierce. Then Respondent's three witnesses testified at this meeting (Harris, Cash, and Knoblock). As pointed out, the only new thing that Jones brought up at this meeting, in addition to the 32-minute break, was that Perkins was consistently late coming into Campbellsville. However, the panel decided that Perkins should go back to his job on the next day, but without backpay, and Perkins did so on October 10, 1979.

B. Respondent's Case as to Bowlds and Perkins

Respondent presented testimony through their witnesses to the effect that, shortly after George Knoblock became feeder manager in May 1979, he received several calls from Campbellsville Center Manager Tom Mouser about Perkins' late return to Campbellsville and complaints that this was delaying his operation. Knoblock told Mouser he would send Supervisor Wayne Pruitt to investigate, and on May 14, 1979, Pruitt service-checked Perkins, and on the following morning Pruitt called Knoblock and reported that Perkins had driven satisfactorily, but several days later Knoblock talked to Mouser and told him that if Perkins started returning to Campbellsville late again, he would send Pruitt back.

Manager Knoblock testified that on August 22, 1979, he was service-checking feeder driver Al Hester on his run to Nashville, and while at the Nashville hub he checked on his other Kentucky drivers who hook up in a line on one side of the Nashville terminal, but he could

⁸ See Resp. Exh. 2.

⁹ See Resp. Exh. 1.

not locate Perkins. Knoblock then checked with the dispatcher and learned that Perkins had logged in, and that later he then saw Perkins coming around the building in his tractor to back up to his trailer at 3:40 a.m. Knoblock stated that when Perkins stepped down he had sleep marks on his face and his eyes were swollen, and by this time Perkins only had 5 minutes left to safety check his vehicle and pull out. Knoblock then instructed Perkins, who had complained that his late arrivals at Campbellsville had been caused by delays at Nashville, to safety check his vehicle and pull out of Nashville by 3:45 a.m.

Turning now to the events and circumstances of August 27 and 28, 1979, as testified to by witnesses for Respondent: Manager Knoblock stated that on the morning of August 27, he telephoned Division Manager Bob Jones to explain the problem he was having with Perkins—that Perkins was continually returning to the Campbellsville Center late but, whenever he rode with a supervisor, he performed satisfactorily. Knoblock then suggested to Jones that he would follow Perkins on his run and watch him and time his movements. Jones suggested that Knoblock get Loss Prevention Supervisor Larry Harris or someone in loss prevention to accompany him during his observance. Later that same morning, Supervisors Cash and Knoblock were in contact with one another and Knoblock told Cash he was going to follow Perkins that night. According to Knoblock, Cash then remarked that this would also be a good night for him to follow feeder driver Bob Bowlds, who had been returning late to Owensboro, and Cash said he would get Supervisor Hugh Gray to accompany him, but when Cash called back he said Gray was not available. Knoblock then told Cash to meet him at Franklin, Kentucky, that night and they would get in one car for the Nashville trip. Knoblock also contacted Larry Harris and that evening they met at the Company's Louisville center and left together in Knoblock's car for Cave City, Kentucky. They arrived at 9 p.m., central time, and waited until 10:10 p.m., but never saw Perkins. When they decided they had missed Perkins, they then went directly to an Amoco station at Exit 6, but again they did not locate Perkins so they drove to the Key truckstop at Franklin. Herschel Cash testified that he arrived in Owensboro on August 27 about 8 p.m., and drove to the intersection of U.S. Highway 60 East and 60 Bypass about one-half mile from the Owensboro terminal, and at 8:45 p.m. he saw Bowlds drive past this intersection, and that he then pulled out behind Bowlds and followed him. Cash said that Bowlds took the Green River Parkway south and stopped about 100 yards beyond the Bowling Green toll both at 9:56 p.m., and from the top of the exit ramp he then observed Bowlds outside his tractor—and that it was 10:20 p.m. before he pulled away—24 minutes later. Cash stated that he then followed Bowlds on Interstate 65 south, and about 20–22 miles down I-65, at Exit 6, Bowlds pulled into an Amoco truckstop at 10:41 p.m., stated that he waited on I-65 a few minutes and then pulled toward the Amoco Truck Stop and met Bowlds leaving the truckstop at 10:46 p.m.—that he then turned around and followed Bowlds to the Key truckstop at Exit 2. Cash said he drove past Bowlds' unit—which was

then parked in front of the Key truckstop—at 10:54 and stayed until 11:16 p.m.—22 minutes.

It appears that, when Knoblock and Harris approached the Key truckstop, they observed a company tractor trailer parked in front of the restaurant with Bowlds in the cab, and that this was at 10:55 p.m. At 11 p.m., when they parked their car, they then observed that the cab of the truck was empty and a few minutes later Knoblock saw Cash in the parking lot and he then went over to Cash's car and told him to join them in Knoblock's car. He stated that the three of them continued to observe the truck until 11:16 p.m., when Bowlds drove by in front of them. The three of them then followed Bowlds into Nashville where he arrived at 12:16 a.m., on August 28, and shortly thereafter Perkins pulled into the Nashville hub. Knoblock said that he then telephoned Jones to tell him what had transpired and that they had not seen Perkins on the down leg.

Witnesses for Respondent testified that at 2:50 a.m., central time, on August 28, Perkins left the Nashville terminal followed by Bowlds at 2:51 a.m., and that they (the three supervisors) followed Bowlds and Perkins one-half mile back on I-65 until about 5 miles south of the Kentucky state line, when they lost track of them, but when Knoblock, Harris, and Cash reached the Key truckstop and still did not see Bowlds or Perkins—Cash got into his car and then both cars proceeded to the Amoco truckstop at Exit 6. It appears that at this point Cash went back to the Key truckstop and Knoblock and Harris went south to the rest area near the state line, and at this time Knoblock and Harris saw Bowlds and Perkins headed north on the other side of the road. Knoblock said that he turned around and followed them to the Amoco truckstop, and that when they arrived at the Amoco truckstop at 3:45 a.m. they observed Bowlds and Perkins in the cafe and testified that they remained there until 4:26 a.m.—32 minutes.

Cash said that he had observed Bowlds' and Perkins' unit about 2 miles north of the Key truckstop, and stated that he then turned around and pulled in the Amoco truckstop at 3:53 a.m. where he observed both Bowlds' and Perkins' units parked and empty in the back of the lot, and at 4:24 a.m. he observed Bowlds and Perkins emerge from the restaurant and, at 4:25 a.m., both Bowlds and Perkins pulled away.

After Bowlds and Perkins pulled away, Knoblock, Harris, and Cash agreed to follow Bowlds back to Owensboro, but Cash suggested that, when they reached the Western Kentucky Parkway, he would call the Owensboro center manager, Tom Campbell, and ask him to note the time Bowlds pulled on the lot, to secure his timecard when he was ready to punch out, and then tell Bowlds they wanted to talk to him. Knoblock testified that, when he and Harris continued to follow Bowlds, they had observed that at 5:31 a.m., about one-fourth mile north of the toll booth, Bowlds' truck was standing on the road and at 5:36 a.m. the rig was still parked when they left and continued into Owensboro.

It appears that around 6 a.m. Knoblock and Harris arrived in Owensboro at the Holiday Inn. Harris then called the Owensboro center and explained what had

happened to Supervisor Buddy Ellis, and Knoblock testified he then called Bob Jones and explained to him what had happened, and that Jones then told Knoblock to let Bowlds punch out and to preserve his timecard, and they would meet later that day to decide what action would be taken. Jones also told Knoblock he would have Division Manager Jim Hatcher contact Acting Campbellsville Center Manager Neil Mulvaney with instructions to keep Perkins' timecard.

Jones testified that, in accordance with the above, he telephoned Division Manager Jim Hatcher—whose area included the Campbellsville center—and told him to be sure to retain Perkins' timecards and log sheet for the day—that Hatcher left the phone, got Perkins' timecard and log sheet, and gave the information to Jones on the telephone—that he then compared what Perkins put on his timecard and log sheet with the information Knoblock supplied, and in so doing realized there was a 17-minute discrepancy on the return leg rest break. Later that same day Jones asked Knoblock to meet him at the Campbellsville center in order to suspend Perkins pending further investigation, and said that he also called West Division Manager Ben Cissell and told him to suspend Bowlds that night pending completion of the investigation.

The subsequent circumstances and events involving the actual suspensions and discharges, and the grievance meetings in relation thereto, have been detailed previously herein.¹⁰

C. Final Conclusions

The answer by Respondent raised as separate defenses the disposition of the Perkins' and Bowlds' grievances and requested the Board to defer its processes to these awards—Respondent argues that, with one exception, the decision of *Spielberg Manufacturing Company*, 112 NLRB 180 (1955), is applicable to the grievance awards in these cases. It is pointed out that since both Bowlds and Perkins amended their unfair labor practice charges to include an 8(a)(4) allegation, there could not be deferral to any award on that allegation, but Respondent argues this charge is so obviously specious that it should be dismissed, and absent such a charge, the *Spielberg* doctrine should be applied to these cases. Respondent then details the various grievance procedures in the bargaining contract, as aforesaid. Moreover, it is pointed out that Bowlds and Perkins pursued their grievances voluntarily through the procedures outlined in article 5 of the contract between the parties and the decision of the grievance committee is as binding on Bowlds and Perkins as it is on Respondent—that by filing their grievances under the contract, Bowlds and Perkins clearly agreed to the submission of their cases to the grievance committee and state panel for decision, and that Bowlds submitted, and the grievance committee considered, nearly identical

issues that are presented in this case—his “union activities” and his participation in the class action lawsuit—as the bases of discrimination against him—that Union Agent Trenaman acknowledged that these issues had been presented at each level of the grievance procedure since they were specifically mentioned in Bowlds' written grievance, and admittedly Trenaman read the grievance aloud as part of his presentation at each step.¹¹

Under the *Spielberg* doctrine, the Board defers to an arbitration award where “the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the Act.” In the instant case, the concerted activities and union activities of Perkins and Bowlds were not brought up at any of the grievance joint meetings except in making a brief mention by reading references to such as part of the grievance language. Moreover, Union Agent Trenaman admitted that he never met with Bowlds or Perkins before the grievance joint panel meetings during the various steps of the grievance procedure, never went over their testimony with them, never introduced any evidence concerning their PROD or UPSurge activities, their class action lawsuit (other than a reference to it in Bowlds' grievance), nor the fact that they had filed grievances under the grievance procedure, nor that they had testified in the earlier Board case (Case 25-CA-10318). In the final analysis, the joint grievance committees and panels here involved did not consider the relevant facts pertaining to union and concerted activities of Bowlds and Perkins; in fact, they were barely made aware of them. Accordingly, I am *not* persuaded that the instant complaint should be dismissed on *Spielberg* grounds.¹²

It is alleged that in March 1979 Respondent maintained a rule prohibiting the distribution of UPSurge material on Respondent's property at any time, and that Supervisor Tom Mouser enforced such rule.

Supervisor Tom Mouser, terminal manager at Campbellsville, testified that no such rule has ever been posted, maintained, or published. However, it is admitted that Respondent promulgated its no-solicitation and no-distribution rule appearing on the employees' bulletin boards both at Campbellsville and at Owensboro, as outlined in General's Counsel Exhibit 10.¹³ The General

¹¹ See Resp. Exh. 4.

¹² In the earlier Board case involving Bowlds (Case 25-CA-10318), as aforesaid, Administrative Law Judge von Rohr, at one stage in the case, issued an order recommending dismissal of his case on the grounds that the Board should defer to the arbitrator's ruling under the doctrine in *Spielberg*. However, in an interim appeal this order was later reversed by the Board, and in its recent decision in this case—252 NLRB 1015—the Board majority outlines in some details their reasons for rejecting *Spielberg* and in so doing reaffirms their previous conclusions that this earlier case was not appropriate for deferral to the arbitration award.

¹³ This rule reads:

No Employee shall solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed.

2. No Employee shall distribute or circulate any written or printed material in work areas at any time, or during his or her working time or during the working time of the employee or employees at whom such activity is directed.

Continued

¹⁰ Jones testified that, between August 28 and August 30, he personally reviewed Bowlds' and Perkins' timecards and log sheets for August 27-28, and compared these with the observations of Knoblock, Harris, and Cash that date, and in so doing was convinced that both men had falsified their timecards and overextended their breaks so he decided to discharge both men; he also decided to handle the discharge of Perkins and directed Division Manager Ben Cissell to handle Bowlds' discharge.

Counsel argues that the above rule is too confining in its language, and therefore unlawful.

The reason the Board holds unqualified restrictions against solicitation "in work areas" improper is because they leave open the question whether the prohibition applies as well while employees are not working. In the instant case, there is credible evidence that Perkins was distributing UPSurge handbills at the terminal in February or March 1979, when Supervisor Mouser inquired of Perkins if he had been distributing "some papers" around the Campbellsville Center. Perkins replied in the affirmative and then told Mouser "we had a right to as long as the man wasn't on the clock working." Mouser answered, "Well, I'd rather you didn't do it."¹⁴ Perkins then explained there was a notice or rule on the bulletin board which permitted the distributions of such leaflets.

While Perkins may have been correct in the overall application or interpretation of the rule in question—permitting the distribution of such material on non working time—nevertheless, the rule did create an ambiguous situation so that employees did not clearly know what was permitted and what was prohibited, and, of course, Supervisor Mouser did nothing to clear up the matter or to lead employees to believe that they could distribute material on nonworking time, as he informed Perkins that "I'd rather you didn't do it" after Perkins had stated that he was distributing on his own time. Moreover, the mere fact that the tone of the conversation may have been friendly or conciliatory does not, of course, erase the implied restrictions by Mouser.

I find that, by promulgating, maintaining, and enforcing this rule during February and March 1979, Respondent violated Section 8(a)(1) of the Act.

Counsel for Respondent points out that it should be emphasized that both Bowlds and Perkins were disciplined only because of their excessive breaks and falsified timecards on August 27–28—that, although both drivers had been returning to their home terminals consistently late, this was not the reason for the discharge, that their habitual late returns and complaints from supervision alerted management to the fact that these drivers were extending their breaks or making unscheduled stops, without authority and without accurately marking their timecards; that it should also be noted that these two drivers were being paid for their extended breaks and unscheduled stops, since only the scheduled 15-minute rest break and the 30-minute lunch period are unpaid—

3. No employee shall enter or remain in the building and other work areas for any purpose except to report for, be present during, or conclude his or her work shift.

¹⁴ Mouser denied that such a conversation took place, but I have credited Perkins, a convincing and straightforward witness, with the more logical recollection that such an incident did occur based upon background, general circumstances, and sequence of events. Moreover, it should be noted that all facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.*

that Bowlds and Perkins were stealing time from the Company and then falsifying the amounts taken on their timecards—that by extending their workday, returning beyond their scheduled return time, they received overtime payments since overtime is paid after 8 hours per day, and at the feeder driver rate of \$11.61 for straight time hours, this translates to an overtime rate of \$17.41 per hour, and that if Bowlds, for example, averaged 15 minutes late return to the Owensboro center on each of his 5 workdays per week, that would amount to 1 hour and 15 minutes of additional overtime which must be paid to him—or \$21.76 per week,¹⁵ and that the delayed returns to the terminals not only cost additional overtime payments to the late-returning feeder driver, but also additional overtime payments to the package delivery drivers, who must wait for the feeder driver trailers to be unloaded and sorted. Campbellsville Center Manager Mouser explained the effect when a feeder driver such as Perkins returns late:

A. Well, it's kind of like a mushroom. If he's [Perkins] late then the delivery drivers are late getting out of the building, consequently they're late coming back into the building, and could be—consequently could be late, the feeder runs that leave that particular night.

What this causes is it causes additional overtime for all my package drivers, and in fact since Perkins is not on schedule it causes additional overtime for him.

It is further pointed out by Respondent that Bowlds acknowledged on cross-examination that he had been instructed to leave the Nashville terminal at 2:45 a.m. and be in Owensboro at 6 a.m. Bowlds also acknowledged that he had been aware for some time that his rest break was not to exceed 15 minutes, and that Bowlds had been given a warning letter at an earlier time for taking more than his allotted 15-minute break, and was terminated in April 1978 for overextending his breaks and falsifying his timecard, and then reinstated with a suspension—that on August 4, 1978, he was terminated again for the same reason and then reinstated at the last step of the grievance procedure with a suspension and final warning.

Respondent also points out that, while Perkins was reinstated to his job by the state grievance panel without backpay, he engaged in the same misconduct—that his testimony was replete with inconsistencies, and his statement that the Campbellsville timeclock was running 10 minutes fast is just one illustration.

Turning now specifically to the late August 1979 suspension and discharge of Bowlds: In essence, management is attempting to show that Bowlds stopped 24 miles on the Green River Parkway on his down leg (south-bound trip) without noting same on his timecard. However, Bowlds—a consistent and straightforward witness—credibly testified that on this occasion he stopped less than 10 minutes and did so to wake up and to relieve himself. There is ample evidence in this record to show that it is a common practice for drivers to stop from time

¹⁵ See G.C. Exhs. 13a-s.

to time to relieve themselves and to wake up by getting out of their truck.¹⁶ There is also ample evidence in this record to show that under normal circumstances when drivers stop for a few minutes to relieve and for wake-up purposes, they do not make any notations of such on their timecards or in their logbooks, and Bowlds also testified that such was the practice when he drove inspection or service runs with supervisors, as aforesaid.¹⁷

In the final analysis, management is adding approximately 26 minutes to the southbound trip from Owensboro to Nashville (14 additional minutes on the Green River Parkway, 5 minutes at Amoco, and an additional 7 minutes at the Key truckstop), yet Bowlds admittedly arrived at the Nashville terminal at 12:18 a.m. on August 28.

It appears very doubtful to me that Bowlds would have arrived at Nashville when he did—if one adopts the observations of management and adds 26 minutes to his stops and rest breaks. It should be remembered that, even when Bowlds drove his service checks with supervisors, and admittedly did not overstay or overextend any break stops—he was still 6 or 7 minutes late, therefore on the occasion here in question, if he overextended his stops by a total of 26 minutes on the down leg, then, in all likelihood, he would have been considerably later on his arrival into Nashville.

On his return leg the Company adds at least 17 minutes (the break stop at Amoco with Perkins), yet Bowlds arrived back at Owensboro at or about 6:16 a.m. Again, if Bowlds actually extended his stop by 17 minutes, it is unlikely he would have arrived at Owensboro when he did, and especially so since, even by stopping the allotted time when supervisors performed service checks, he was still several minutes late. Moreover, the timecards for Bowlds in July and August 1979 reveal that his normal driving time, for the most part, from Owensboro to Nashville and return, was 3 hours and 20 minutes (each way), and on the night and morning here in question Bowlds was still very close to his normal 3 hours and 20 minutes—which would have been very difficult to achieve with the additional stops and durations suggested by management.¹⁸

It is also evident to me that Bowlds was singled out as the subject of rather extraordinary surveillance activity by Respondent's supervisors at a time when he was

known to be engaged in protected concerted activities.¹⁹ In this regard Supervisor Cash decided to follow Bowlds after Knoblock had informed him that he (Knoblock) was going to follow Perkins, and then rather extensive travel plans and arrangements were made in order to conduct these surveillance exercises, as aforesaid. In any event, I find it difficult to believe that, absent some outside motion, management would go to such lengths in following Bowlds without even first having discussed his alleged late arrivals directly with him, and/or with the supervisor of the Owensboro facility, Thomas Campbell.

It also appears to me that while the Company makes considerable attempts to have the feeder drivers arrive at their destinations on time and that prompt arrivals are important to them, nevertheless, exact "punctuality" is not as paramount as it would seem to be. In March and May 1979, Supervisor Cash performed service checks on Bowlds, as aforesaid, and on these occasions Bowlds was 4 to 8 minutes late (both directions) but nothing was said about it nor were any real corrective measures instituted—Cash merely informed Bowlds that he should go faster on the down hills. Moreover, punctuality and exact arriving times also receives another back seat in Respondent's argument where it is emphasized that excessive breaks and falsified timecards were the reasons for the discharges, and late returns or arrivals at terminals merely alerted management that Bowlds was extending breaks and making unscheduled stops without authority and without accurately marking his timecard.

In summary, the evidence in this record shows that Respondent built up Bowlds' entitled and authorized breaks on the night and morning of August 27-28, to 43 additional minutes by announcing nonbreak toilet stops, by announcing a nonexistent southbound stop at Amoco, and by alleging overextensions at the coffeehouses (Key stop and Amoco stop), all contrary to the graveyard shift managers of the coffeehouses as well as Bowlds' and Perkins' testimony. Additionally, as also pointed out, Supervisor Cash testified that Bowlds had a bad late-arrival record at the home terminal at Owensboro, but when analyzed the record shows that Bowlds had a satisfactory record—a steady 3 hours and 20 minutes record of driving, and with only a few minutes extra on occasions where fog or an accident held him up.

Turning now to the suspension and discharge of Perkins. His scheduled feeder run required him to leave Campbellsville at 10:14 p.m., after he started work at 9:55 p.m. His initial designation was the Nashville hub at 1:32 a.m. From that time until 3:25 a.m., when he was scheduled to depart, he was allowed a 30-minute lunch break, and then was required to shift cars, hook to a new trailer, and refuel. On the down leg to Nashville, Perkins was allowed a 15-minute break plus 5 minutes to safety check his vehicle and update his logbook. Once the

¹⁶ Supervisor George Knoblock was asked if he had seen Bowlds outside his truck on the occasion in question, and his replies were as follows:

A. He was outside of the vehicle, yes, sir.

Q. Was he walking around the tractor and trailer, or just standing there, or what?

A. He was standing.

Q. With regard to that. Are you aware that drivers do stop along the highway, either to relieve themselves, or wake themselves up, as a common practice?

A. To relieve themselves, yes.

Q. Uh huh. How about to wake themselves up, meaning if a man is sleepy in the middle of the night he'll walk around to—

A. He'll—

Q. —get himself awake, or alert?

A. Yes.

¹⁷ As noted, I have also credited the testimony of Bowlds as to his other stops—where he stopped, the frequency of such stops, and the duration of his stops on the night and morning of August 27 and 28.

¹⁸ I will discuss further aspects of the Amoco stop in the section dealing with Perkins.

¹⁹ As detailed earlier herein, Bowlds distributed UPSurge and PROD materials at the terminal in Owensboro, was a union member of Local 89, and was a union steward handling several grievances each month, up to the present has not indicated any withdrawal in participation with the filing of a civil suit against Respondent in a U.S. district court, and has filed charges with the Board and given testimony in a prior case against Respondent heard during April, May, and September 1979 (Case 25-CA-10318).

safety inspection is complete and he leaves his truck, his 15-minute break begins. Perkins was scheduled to leave the Nashville hub no later than 3:45 a.m. headed toward Bowling Green, Kentucky, but, before his arrival there, he was allowed another 15-minute break. It appears that his normal scheduled arrival at the Bowling Green Center was 5:36 a.m., where he dropped his Nashville trailer, hooked up to another trailer, performed a pretrip safety inspection, and then headed for the Campbellsville center. His arrival at Campbellsville was 7:41 eastern time.

Respondent points out and argues that Perkins had been frequently instructed about the specific schedule times of his feeder run—that in 1978 Feeder Supervisor Wayne Pruitt “stressed heavily” to leave the gate at Nashville no later than 3:45 a.m. It is also pointed out that the packages which Perkins returns to Campbellsville are immediately sorted and preloaded on package delivery cars which are then dispatched within 1 hour of Perkins’ return for delivery, and any delay in Perkins’ return to Campbellsville caused a delay in the preload and dispatch of the package cars.

The only real controversy as to Perkins involves his stop at the Amoco truckstop on his return trip. Perkins stated that he was there for 15 minutes on his break, while the Company maintains he and Bowlds stayed 32 minutes.

Counsel for Respondent points out that in his testimony Perkins stated that on the morning of August 28 he arrived at the Amoco truckstop at 3:58 a.m., central time, because he looked at his watch, but in an affidavit given to the NLRB on October 3, Perkins stated that he and Bowlds arrived at the Amoco truckstop at 4 a.m., central time; further, that Perkins recited in his affidavit he knew it was 4 a.m. because he glanced at his watch, but when confronted with the inconsistency, Perkins selected the 3:58 a.m., central time, he had testified about. Respondent argues that neither version conforms to Bowlds’ timecard for his August 28 rest break at Amoco which he indicates started at 3:56 a.m., and thus Bowlds’ timecard reflects that he started his break at least 2 minutes before Perkins pulled in the Amoco parking lot. Moreover, argues Respondent, Bowlds claims that he and Perkins entered the restaurant and sat together in a booth for their break until they both left the restaurant at 4:11 a.m. (Bowlds entered these times on his timecard), while Perkins testified that they began their break at 4:05 a.m. and finished at 4:20 a.m., central time, and so marked his timecard. Respondent argues that neither version is accurate as both of them overextended their breaks and falsified the times on their timecards.

While there are some discrepancies in the timecards of Bowlds and Perkins as to when their breaks actually started and ended at the Amoco truckstop on the morning of August 28, nevertheless, it appears to me that such discrepancies must be deemed of a minor nature when considering the fact that drivers were permitted a 5-minute interval or leadway at breaktime to bring their logbooks up to date which Perkins did, and the recognized fact that watches and clocks will occasionally vary at least a few minutes one way or another as is evident with the clock at Campbellsville. However, and more

importantly, the oral testimony given by Perkins (and Bowlds) on the times they arrived and left the Amoco truckstop on August 28 are in *substantial* agreement with the times noted on their timecards, and this is so even though their testimony at the hearing before me was given almost 8 months later.

In consideration of the overall circumstances involving Perkins, it must also be remembered that his arrival time back in Campbellsville had been changed in early 1979 from 8:05 to 7:55 a.m., as aforesaid, and Perkins admitted that thereafter, on the average, he was late by 5 to 10 minutes in getting back, but he explained to Supervisor Tom Mouser this was due to being late getting out of Bowling Green or Nashville. Moreover, that when Supervisor George Knoblock talked to him in August 1979 about being late, he then informed Knoblock that he would “always be late” in getting back to Campbellsville as the clock there was running 10 minutes fast. It is also noted that Respondent had assigned no particular or specific hardships in their operations even though Perkins was running late in his arrivals back at Campbellsville. There is no testimony that the packages did not get out on the connecting trucks or feeders.

It is evidence to me that Perkins was also singled out as the subject of extraordinary surveillance by supervisors at a time when he was known to be engaged in protected concerted activities—Perkins had testified in the earlier case (Case 25-CA-10318) involving Bowlds, he had distributed UPSurge handbills in early 1979 in the presence of Supervisor Mouser and had been told not to do it, he had also at one time distributed PROD at the terminal in Campbellsville, he had collected money and signatures at Campbellsville for the class action civil suit, as aforesaid, and Perkins had also filed grievances against Respondent. In addition to the above, it is again noted that on or about February 28, 1979, Perkins had requested of management additional trousers or pants to complete his uniform, and in reply to this request Supervisor Mouser told Perkins that they were “trying to figure out a way to fire your ass anyway. We won’t have to get you any.”

In summary, the evidence in this record shows that Respondent attempted to add on 17 minutes as an over-extension to Perkins’ break stop, but the credited testimony by Perkins and others reveals that his break at the Amoco truckstop was within the allotted time, and such notation on his timecard was substantially corroborated by his oral testimony.

In the instant case, I have found that the General Counsel made a *prima facie* showing sufficient to support the inference that protected conduct was the motivating factor in the suspensions and discharges of Bowlds and Perkins, and in my view Respondent has failed to demonstrate that such actions would have taken place in the absence of the protected conduct. In accordance therewith, Respondent is in violation of Section 8(a)(1), (3), and (4) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily suspended and discharged Robert Bowlds and David Perkins, I shall recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment of a sum of money equal to that which he would have normally earned from the date of Respondent's discrimination, less net earnings, during said period. All backpay provided herein shall be computed with interest on a quarterly basis, in the manner described by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977)²⁰.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.
3. By engaging in the conduct described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

Upon the foregoing findings of fact and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²¹

The Respondent, United Parcel Service, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and enforcing a no-distribution rule, prohibiting distribution of union materials on company property at any time.

(b) Suspending and discharging employees because they engage in concerted activity for their mutual aid or protection, and/or because of their testimony in a Board proceeding.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Robert Bowlds and David Perkins immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to a substantially equivalent position, and make them whole for any loss of pay and other benefits in the manner set forth in the remedy section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Owensboro and Campbells-ville, Kentucky, copies of the attached notice marked "Appendix."²² Copies of said notices, on forms to be provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

²⁰ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

²¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."